UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 9

FULL SAIL PARTNERS, LLC [1]/

Employer

and Case 9-RC-18256

UNITED FOOD AND COMMERCIAL
WORKERS INTERNATIONAL UNION,
LOCAL 1059 [2]/

Petitioner

REGIONAL DIRECTOR'S DECISION AND DIRECTION OF ELECTION

I. INTRODUCTION

The Employer is engaged in the retail sale of optical services, including eyeglasses and contact lenses. It operates three optical stores located within Meijer grocery stores in the Greater Columbus, Ohio area, the only facilities involved in this proceeding. The Petitioner has filed a petition with the National Labor Relations Board under Section 9(c) of the National Labor Relations Act seeking to represent a multi-location unit consisting of all the Employer's full-time and regular part-time certified and uncertified optician technicians employed at Meijer's grocery stores located in Reynoldsburg, Canal/Winchester, and Grove City, Ohio, excluding all office clerical employees, professional employees, managerial employees and all guards and supervisors.

At the hearing, the parties stipulated that there is one certified optician and one uncertified optician at the Reynoldsburg site, one certified optician at the Canal/Winchester location and one certified optician at the Grove City store. [3]/ The Employer contends that the three certified opticians should be excluded as supervisors within the meaning of Section 2(11) of the Act and/or managerial employees, resulting in a single employee unit consisting of the uncertified optician. Accordingly, the Employer asserts that the petition

[1]/ The name of the Employer appears as amended at the hearing.

[2]/ The name of the Petitioner appears as amended at the hearing.

[3]/ Throughout the record certified opticians were also referred to as managers and uncertified opticians were referred to as op. techs, apprentices and associates.

should be dismissed. [4]/ The Petitioner, contrary to the Employer, avers that the certified opticians are neither supervisors nor managers and should be included in the unit.

I have considered the record evidence as a whole, the relevant case law and the arguments made by the parties at the hearing. [5]/ I find that the certified opticians are not supervisors as defined in the Act or managerial employees. In this regard, the evidence failed to demonstrate that any of the certified opticians possess the indicia of supervisory status as defined by Section 2(11) of the Act. Thus, no probative evidence was adduced in the record to establish that they have the authority to hire, transfer, suspend, layoff, recall, promote, discharge, assign, reward, discipline or responsibly direct employees or adjust employee grievances or possess the authority to effectively recommend such actions. Further, the record evidence failed to establish that the certified opticians are managerial employees. In this regard, the evidence did not establish that they formulate or influence management policy nor are they free to deviate from established company policy. In explaining how I came to my determination on these issues, I will first describe the Employer's operations and discuss the duties of the employees at issue, then set forth the applicable legal precedent and analyze each issue in relation to that precedent. Before beginning my analysis, I note that there is no history of collective bargaining affecting any of the employees involved in this proceeding.

II. FACTUAL OVERVIEW OF THE EMPLOYER'S OPERATIONS AND DUTIES OF THE CERTIFIED AND UNCERTIFIED OPTICIANS

The Employer has a total of 19 optical stores covering 4 states. The Employer's headquarters is located in Plymouth, Indiana; its chief executive officer (CEO) is Eric Bertrand and Jason Powell is the vice-president of operations. The record reflects that three office clericals also work at the corporate headquarters: Erica Liechty [6]/, who handles paperwork, employee issues and insurance matters; Christine [7]/, who is in charge of payroll, billing and banking, and, Sarah Brian who deals with technical support and customer complaints. The only employees involved in this matter are the four persons employed by the Employer at its three Columbus, Ohio area optical stores at the locations mentioned previously. The three optical stores are located within Meijer grocery stores and are approximately 900 square feet.

All three optical stores are open Monday through Saturday from about 10:30 a.m. to 5:30 p.m. The Reynoldsburg location is staffed by certified optician, Donna Denk; an uncertified optician, Susan Coward; and, an optometrist, who is not employed by the Employer and works Mondays, Fridays and Saturdays administering eye exams. Certified

[4]/ The Employer concedes that should I find that the certified opticians are not supervisors or managerial employees that the uncertified optician should be included in the unit with them.

[5]/ The parties waived the filing of post-hearing briefs.

[6]/ Erica Liechty is also referred to in the record as Erica Bostwick.

[7]/ Christine's surname was not mentioned in the record.

optician Anthony Lammkin works at the Canal/Winchester location and certified optician Jack Simon is assigned to the Grove City store. There are no optometrist or uncertified opticians working at the Canal/Winchester and Grove City locations. Moreover, it appears from the record that apart from the three certified and one uncertified optician(s) there are no other employees working at any of the three stores. In the past, there have been certified opticians who worked as "floaters" traveling between the three locations substituting for certified opticians who are absent or on vacation, but no one is presently employed in that capacity. At the hearing, the parties stipulated that the three certified opticians, Denk, Lammkin and Simon, share the same duties and responsibilities. Bertrand testified that in the near future, the Employer may hire an additional certified optician for the Reynoldsburg store and another certified optician who would split his/her time between Grove City and Canal/Winchester. However, the record reflects that the date when these persons will be employed is uncertain.

To become a certified optician in the State of Ohio, individuals must work as an apprentice, also referred to here and in the record as an uncertified optician, for a certain period of time under the tutelage of a certified optician. Once that apprenticeship is completed, the optician must pass a state board examination to become certified. Any certified optician can serve as a trainer of an apprentice. There are state guidelines governing the conduct of both certified opticians and uncertified opticians who are in training. For example, the record discloses that the state requires certified opticians to be present whenever the optometrist is present. Also, uncertified opticians may not handle eyeglasses without the guidance of the certified optician.

The record discloses that the certified opticians are responsible for selling eyeglasses, contact lenses and, in Denk's case, eye exams. The certified optician handles the eyeglasses, measures the fit for the customer, orders the lenses from a lab selected by CEO Betrand, and contacts the customer when the eyewear is received from the lab. The certified optician, unlike the uncertified optician, ensures that the prescription glasses are within the tolerance guidelines, meaning that lenses created by the lab are sufficiently close to the customer's prescription. If the glasses are not within the "tolerance level," then the certified optician must return them to the lab. The certified opticians, unlike the one uncertified optician, participate in weekly telephone conference calls with Jason Powell wherein they discuss such topics as sales events and promotions, concerns with the lab, and delivery issues. If there are any sales or promotions, the certified optician advertises the event by putting up a sale sign and they occasionally promote beyond the "lease line" [8]/ by distributing flyers or seeking permission from Meijer personnel to announce the sale over its public announcement system. At the end of the work day, either the certified or uncertified optician closes out the till and deposits the money at the bank.

The only uncertified technician in the petitioned for unit is Susan Coward, who works all day on Thursdays, and from about 10:30 a.m. to 3:30 p.m. on Fridays. She works alone on Thursdays, and because of the state mandated restrictions relating to her uncertified

[8]/ The "lease line" is where the Employer's store and the Meijer store meet.

status, she primarily answers the phone and schedules appointments. It appears that on Fridays, since Denk is present, Coward can perform duties similar to a certified optician, such as measuring the eyeglass fit, but cannot verify that prescriptions are within the tolerance level.

The Employer submitted job descriptions for certified opticians entitled "Overview of the Manager Job Description," which Jason Powell testified were in the employee packets that the certified opticians receive upon hire. Powell acknowledged, however, that the Employer had only placed these job descriptions in the online folder, where the employee handbook and other documents are maintained, within the 2 week period preceding the hearing. Denk and Simon testified that either they had not seen the job description or only became aware of it when it was placed in the Employer's computer system. The job description provides that certified opticians are responsible for hiring the best people and training them to be opticians and to ensure that uncertified opticians are in compliance with attendance policies. Also admitted into evidence was a copy of an email, acknowledged by Powell, sent on July 8, 2009, from Erica Liechty to all certified opticians, which read, "NO DECISIONS – in regards to employees or doctors – are to be made without Jason's expressed permission."

III. LEGAL FRAMEWORK

A. Supervisors:

Supervisors are defined in Section 2(11) of the Act as:

> Any individual having the authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

To meet the definition of a supervisor set forth in Section 2(11) of the Act, a person needs to possess only one of the 12 specific criteria listed, or the authority to effectively recommend such action. *Ohio Power Co. v. NLRB*, 176 F.2d 385 (6th Cir. 1949), cert. denied, 338 U.S. 899 (1949). The exercise of that authority, however, must involve the use of independent judgment. *Harborside Healthcare, Inc.*, 330 NLRB 1334 (2000). Thus, the exercise of "supervisory authority" in merely a routine, clerical, perfunctory or sporadic manner does not confer supervisory status. *Chrome Deposit Corp*., 323 NLRB 961, 963 (1997); *Feralloy West Corp. and Pohng Steel America*, 277 NLRB 1083, 1084 (1985).

Possession of authority consistent with any of the indicia of Section 2(11) is sufficient to establish supervisory status, even if this authority has not yet been exercised. See, e.g., *Pepsi-Cola Co*., 327 NLRB 1062, 1063 (1999); *Fred Meyer Alaska*, 334 NLRB 646, 649 at fn. 8 (2001). The absence of evidence that such authority has been exercised may, however, be probative of whether such authority exists. See, *Michigan Masonic Home*, 332 NLRB 1409, 1410 (2000); *Chevron U.S.A.*, 308 NLRB 59, 61 (1992).

In considering whether the putative supervisors involved here possess any of the supervisory authority set forth in Section 2(11) of the Act, I am mindful that in enacting this section of the Act, Congress emphasized its intention that only supervisory personnel vested with "genuine management prerogatives" should be considered supervisors, and not "straw bosses, leadmen, set-up men and other minor supervisory employees." *Chicago Metallic Corp.*, 273 NLRB 1677, 1688 (1985). Thus, the ability to give "some instructions or minor orders to other employees" does not confer supervisory status. *Id.* at 1689. Such "minor supervisory duties" do not deprive such individuals of the benefits of the Act. *NLRB v. Bell Aerospace Co*., 416 U.S. 267, 280-281 (1974), quoting Sen. Rep. No. 105, 80th Cong. 1st Sess., at 4. In this regard, the Board has frequently warned against construing supervisory status too broadly because an individual deemed to be a supervisor loses the protection of the Act. See, e.g., *Oakwood Healthcare, Inc.*, 348 NLRB 686, 688 (2006); *Vencor Hospital – Los Angeles*, 328 NLRB 1136, 1138 (1999); *Bozeman Deaconess Hospital*, 322 NLRB 1107, 1114 (1997).

Proving supervisory status is the burden of the party asserting that such status exists. *NLRB v. Kentucky River Community Care, Inc.*, 532 U.S. 706, 711-712 (2001); *Arlington Masonry Supply*, 339 NLRB 817, 818 (2003); *Dean & Deluca New York, Inc.*, 338 NLRB 1046, 1047 (2003). As a general matter, I note that for a party to satisfy the burden of proving supervisory status, it must do so by "a preponderance of the credible evidence." *Dean & Deluca*, supra at 1047; *Star Trek: The Experience*, 334 NLRB 246, 251 (2001). The preponderance of the evidence standard requires the trier of fact "to believe that the existence of a fact is more probable than its non-existence before [he] may find in favor of the party who has the burden to persuade the [trier] of the fact's existence." *In re Winship*, 397 U.S. 358, 371-372 (1970). Accordingly, any lack of evidence in the record is construed against the party asserting supervisory status. See, *Williamette Industries, Inc.*, 336 NLRB 743 (2001); *Michigan Masonic Home*, 332 NLRB at 1409. Moreover, "[w]henever the evidence is in conflict or otherwise inconclusive on a particular indicia of supervisory authority, [the Board] will find that supervisory status has not been established, at least on the basis of those indicia." *Phelps Community Medical Center*, 295 NLRB 486, 490 (1989). Consequently, mere inferences or conclusionary statements without detailed specific evidence of independent judgment are insufficient to establish supervisory status. *Sears, Roebuck & Co.*, 304 NLRB 193 (1991).

The Board revisited the issue of supervisory status in *Oakwood Healthcare, Inc.*, 348 NLRB 686 (2006) and two companion cases, *Croft Metals, Inc.*, 348 NLRB 717 (2006) and *Goldencrest Healthcare Center*, 348 NLRB 727 (2006). In these decisions, the Board refined its analysis in assessing supervisory status in light of the Supreme Court's decision in *Kentucky River,* supra. In *Oakwood*, the Board addressed the Supreme Court's rejection of the Board's definition of Section 2(11) in the healthcare industry as being overly narrow by adopting "definitions for the term 'assign,' 'responsibly to direct,' and 'independent judgment' as those terms are used in Section 2(11) of the Act." *Oakwood*, supra, at 688.

With regard to the Section 2(11) criterion "assign," the Board considered that this factor shares with other Section 2(11) criteria the "common trait of affecting a term or condition of employment" and determined to construe the term "assign" "to refer to the act of designating an employee to a place (such as a location, department, or wing), appointing an employee to a time (such as a shift or overtime period), or giving significant overall duties, i.e., tasks, to an

employee." Id. at 687. The Board reasoned that, "It follows that the decision or effective recommendation to affect one of these – place, time, or overall tasks – can be a supervisory function." Id. The Board clarified that, ". . . choosing the order in which the employee will perform discrete tasks within those assignments (e.g., restocking toasters before coffeemakers) would not be indicative of exercising the authority to 'assign.'" Id.

In *Oakwood*, the Board explained that, "responsible direction," in contrast to "assignment," can involve the delegation of discrete tasks as opposed to overall duties. 348 NLRB at 690-692. The Board reasoned, however that "for direction to be 'responsible,' the person directing and performing the oversight of the employee must be accountable for the performance of the task by the other, such that some adverse consequence may befall the one providing the oversight if the tasks performed by the employees are not performed properly." In clarifying the accountability element for "responsibly to direct" the Board noted that, "to establish accountability for purposes of responsible direction, it must be shown that the employer delegated to the putative supervisor the authority to direct the work and the authority to take corrective action if necessary. It also must be shown that there is a prospect of adverse consequences for the putative supervisor if he/she does not take these steps." Id. at 692.

Assignment or responsible direction will, as noted above, produce a finding of supervisory status only if the exercise of independent judgment is involved. Independent judgment will be found where the alleged supervisor acts free from the control of others, is required to form an opinion by discerning and comparing data, and makes a decision not dictated by circumstances or company policy. Id. at pp. 692-694. Independent judgment requires that the decision "rise above the merely routine or clerical." Ibid.

B. Managerial Employees:

Although not specifically referenced in the Act, the Supreme Court has established an outline for identifying individuals who have managerial responsibilities that exclude them from the protection of the Act:

> Managerial employees are defined as those who "formulate and effectuate management policies by expressing and making operative the decisions of their employer." . . . These employees are "much higher in the managerial structure" than those explicitly mentioned by Congress, which "regarded [them] as so clearly outside the Act that no specific exclusionary provision was thought necessary." . . . Managerial employees must exercise discretion within, or even independently of, established employer policy and must be aligned with management. . . . Although the Board has established no firm criteria for determining when an employee is so aligned, normally an employee may be excluded as managerial only if he represents management interests by taking or recommending discretionary actions that effectively control or implement employer policy. *NLRB v. Yeshiva University*, 444 U.S. 672, 682-683 (1980) (citations omitted).

The party seeking to exclude either a whole class of employees or a particular individual as managerial has the burden of presenting the evidence necessary to establish such exclusion. *University of Great Falls*, 325 NLRB 83, 93 (1997); *Montefiore Hospital & Medical Center*, 261 NLRB 569 at fn. 17 (1982).

IV. ANALYSIS

In considering the record as a whole, the arguments of the parties at the hearing, and the legal precedent described above, I find that the Employer has failed to sustain its burden of establishing that the certified opticians are supervisors as defined by the Act or are managerial employees. Initially, I note that there is no probative evidence that the certified opticians have the authority to transfer, suspend, layoff, recall, promote, or discharge employees or to recommend the same or to adjust employee grievances. In this regard, CEO Bertrand gave conclusionary testimony that certified opticians have the authority to engage in the above-cited conduct but he was unable to provide any examples to support his conclusions. Further, two of the certified opticians, Denk and Simon, testified that they do not possess or exercise such authority. Moreover, the record failed to show that the certified technicians participate in the formulation of company policy or that they had the authority to depart from established policy. [9]/

SUPERVISORY AUTHORITY:

1. HIRING AND WAGE RATES:

The Employer contends that the certified opticians hire employees. It is well established that the ability to hire or to effectively recommend hiring confers supervisory status only when exercised with independent judgment on behalf of management. See, *Bowne of Houston*, 280 NLRB 1222, 1223 (1986). Recommending an applicant for hire contemplates more than merely screening applicants or engaging in other ministerial participation in the interview process. *Id* at 1225. Moreover, a putative supervisor who simply advises management about an applicant's work experience or technical skills does not make a hiring decision or effective recommendation in circumstances where management also interviews the applicants and has final hiring authority. See also, *The Door*, 297 NLRB 501 (1990); *Aardvark Post*, 331 NLRB 320 (2000); *J.C. Penney Corporation*, *Inc*., 347 NLRB 127 (2006).

Powell testified that certified opticians are responsible for hiring uncertified opticians but that wherever possible he gets "as involved as I can" in interviewing applicants for both uncertified and certified optician positions. Denk and certified optician Jack Simon testified that they do not possess the authority to hire, and that they have never been told that they have the authority to hire or to effectively recommend the hire of a prospective employee. The record discloses that Denk may have interviewed Sarah Coward for the uncertified optician position, but there is insufficient evidence in the record concerning the nature or extent of Denk's participation in this interview. The testimony does make clear that the corporate office directed Denk to hire an apprentice and, upon accepting Coward's application, Denk forwarded it to Powell. Denk testified that her only recommendation was that Coward seemed like a good candidate and that Coward could work any time. Powell later called Denk and instructed her to

[9]/ CEO Bertrand's testimony regarding all statutory indicia of supervisory status and managerial factors were consistently conclusionary and lack the probative weight sufficient to support the Employer's claims. See, *Sears, Roebuck & Co*., 304 NLRB 193 (1991).

offer the position to Coward at a particular pay rate. The record does not establish whether Denk was the only person to interview Coward before her hire or what impact Denk's limited recommendation had on the Employer's decision to hire Coward. [10]/ It is apparent that Denk did not independently make the decision to hire an uncertified optician and the Employer failed to establish that Denk effectively recommended Coward's hire.

Upon the Employer's request, Denk also interviewed applicant Brianna Reeves for a floater position. Denk informed Powell that she did not think Reeves would be a good candidate because Reeves was late for the interview and because of reports she had heard from other people. Apparently Reeves was not hired, however, the record does not disclose why she was not hired or what effect, if any, Denk's negative recommendation had on this decision. [11]/

The record discloses that Simon interviewed, either alone or with Denk, four applicants, three of whom were hired. One applicant was rejected because she was unable to work the hours required by the business and it appears the Employer agreed that this applicant should not have been hired. This conclusion that the applicant was unsuitable because she could not work when needed did not involve the exercise of independent judgment. With regard to those who were ultimately hired, the Employer failed to adduce evidence establishing that Simon and Denk hired these applicants without review by a higher authority or that Simon's and Denk's recommendations carried weight or were instrumental in the Employer's decision to hire the applicants.

Although Powell testified that he has conferred with certified opticians in deciding upon a new hire's initial pay rate, the record does not establish that the certified opticians either determined or effectively recommended the new hire's initial pay rate. Indeed, Powell did not provide any examples of how the certified opticians played a role in determining the initial pay rates for new hires and the record discloses that no such discussion took place with Denk upon Coward's hire. For the Employer to meet its burden of proof, its testimony must include specific details making clear the claimed supervisory authority actually exists. See, *Avante at Wilson*, 348 NLRB 350-351 (2006).

To the extent that the job descriptions indicate that certified opticians are responsible for hiring uncertified opticians, the Board has long held that "abstract, theoretical or rule book authority does not transform an employee into a supervisor . . . job descriptions are not determinative of the question" and in this case, is contradicted by the factual record, including the July 9 email sent to the certified opticians stating that no decisions concerning employees could be made without Powell's approval. [12]/ See, *Wilson Tree Company, Inc*. 312 NLRB 883, 892 (1993).

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[10]/ Denk testified that she did not believe that anyone else interviewed Coward; however, the record does not show how she would know if Powell or any other management official contacted or failed to contact Coward.

[11]/ Indeed, it is unclear whether Reeves is still being considered for employment by the Employer.

[12]/ The Employer claimed that this email was "poorly written" and was not intended to mean that certified opticians could not make any decision without Powell's approval. However, Powell reviewed the email and never clarified or retracted it.

2. REWARD**:**

The Employer contends that certified opticians have the ability to reward uncertified opticians by evaluating them and recommending them for the employee of the month award. The Board, however, has repeatedly noted that Section 2(11) does not include the criterion "evaluate" in its enumerations of supervisory indicia; thus, when an evaluation does not by itself affect wages, promotional opportunities or the job status of the employee evaluated, the person completing the evaluations will not be deemed a supervisor on that basis. See, *Harborside Healthcare, Inc*., 330 NLRB 1334 (2000); *Elmhurst Extended Care Facilities*, 329 NLRB 535 (1999).

Although the certified opticians have completed evaluations, the record does not establish that these evaluations affect wages, lead to promotions or affect employee status in any way. In this regard, Denk testified that she recommended a wage increase for Coward after completing her evaluation; however, there was no evidence that Coward ever received a pay increase as a result of Denk's recommendation. Moreover, it appears that Powell, for reasons that are unstated in the record, reviews the evaluations before they are given to the evaluated employee. For example, Denk forwarded the above-cited evaluation of Coward to Powell for his approval before she presented it to Coward. Likewise, Denk evaluated floater Jonathon Rutkin, at Powell's request, and Powell approved the evaluation before Denk gave it to Rutkin. In this same vein, Simon testified that he conducted an evaluation of employee Ann Marie Rizzo and was later told not to do evaluations without clearing it with Powell.

The record does not establish who determines whether an employee will receive a pay raise or promotion, whether pay raises or promotions are given at certain intervals, or what specific weight, if any, is given to a certified optician's evaluation of an employee. Powell testified that a certified optician's evaluation "can affect" the pay of the evaluated employee, but he failed to provide any examples where or how a certified optician's evaluation affected an employee's pay. Such "imprecise testimony" that evaluations "are 'associated with' rewards and 'can be' or were, 'used' in granting rewards" is wholly insufficient in establishing that recommendations were effective. *Loparex LLC*, 353 NLRB No. 126 (2009).

With regard to the employee of the month awards, Simon acknowledged that he nominated Rizzo for the award, which she received at some point. However, significantly lacking from the record was evidence showing what a recipient of the reward receives—that is, what affect, if any, the award has on the rewarded employee's pay, promotional opportunities or job status.

3. DISCIPLINE:

I now turn to the role of the certified opticians in disciplining employees. To confer supervisory status based on this criterion, the evidence must establish that the disputed supervisor's participation in the disciplinary procedure leads to a personnel action without independent review or investigation by other managerial or supervisory personnel. *Franklin Home Health Agency*, 337 NLRB 826, 830 (2002), citing *Beverly Health & Rehabilitation Services, Inc*., 335 NLRB 635 (2001). In this regard, the Board has consistently held that the mere exercise of a reporting function that does not automatically lead to further discipline or adverse action against an employee does not establish supervisory authority. See, *Illinois*

Veterans Home At Anna L.P., 323 NLRB 890 (1997); *Ten Broeck Commons*, 320 NLRB 806, 812 (1996). The Board has long that the issuance of oral warnings in and of itself does not demonstrate supervisory authority. *Vencor Hospital-Los Angeles*, 328 NLRB 1136 (1999).

In February 2009, Denk complained about problems she was having with Rutkin to either Erica Lietchy or Sarah Brian, who then instructed her to issue Rutkin a verbal warning. Simon also had complaints and concerns about Rutkin. To address these concerns, Simon met with Rutkin and gave him a document listing things that he could and could not do, which he had Rutkin sign. About this same time, Simon emailed Powell a list of complaints about Rutkin. It appears from the record that Powell later emailed the certified opticians to inform them that he was going to talk to Rutkin and give him one more chance to improve.

There is no evidence in the record about the Employer's disciplinary system, or even whether one exists. Further, there is nothing in the record to show whether the document that Simon issued to Rutkin was maintained in Rutkin's personnel file or if it was relied upon in any later disciplinary action, or given any consideration at all. Thus, from the record facts, I must conclude that the certified opticians' role in disciplinary action is merely a reportorial function.

4. ASSIGN AND RESPONSIBLY DIRECT:

Turning to the criteria of assignment and responsible direction, the Board has defined assignment as the act of designating an employee to a place, appointing an employee to a time, or giving significant overall tasks. *Oakwood,* supra at 689. The Board has found that a supervisor has authority to responsibly direct an employee when the individual decides, "what job shall be undertaken next or who shall do it . . . provided that direction is both 'responsible' . . . and carried out with independent judgment." *Oakwood*, supra at 691.

There is insufficient evidence in the record to support the Employer's claim that the certified opticians either assign work or responsibly direct employees in the manner outlined in *Oakwood*. It should be noted that only Denk is presently working with an uncertified optician and they work together for a limited period of time, approximately 5 hours a week. There are no floaters currently employed by the Employer, but when employed they work on days that the certified opticians are not working. [13]/ Inasmuch as Denk is training Coward to become a certified optician, she must give Coward some direction regarding optical duties, i.e., how to measure glasses to fit a customer and, in the past, Simon similarly trained Rizzo. It appears from the record that this direction is derived from Denk's and Simon's greater skill and training which does not confer supervisory status. See, *Byers Engineering*, 324 NLRB 740 (1997) (authority to issue instructions and minor orders based on greater job skills does not amount to supervisory authority).

[13]/ I note that floaters are certified opticians and, as such, would be statutory supervisors and managers if the Employer were successful in its assertions here. Such an outcome could result in a situation whereby two supervisors are working at a store, reporting to each other, and without overseeing a non-supervisory employee. This possibility would also come to fruition in the Grove City and Canal/Winchester locations whereby the Employer expects to employ one full-time certified optician and one part-time certified optician, and no uncertified opticians.

With respect to the ability of certified opticians to schedule work hours, the record reflects that the Employer has prohibited any working of overtime. Further, flexibility in scheduling is limited by state guidelines mandating that a certified optician be present when an optometrist is on duty (here, the optometrist works Mondays, Fridays and Saturdays) and by the Employer's requirement that certified opticians work on Saturdays. Within the confines of these restrictions, Denk and Coward have arranged their work schedules between themselves. If either wants a vacation, they work that out too, and if they are unsuccessful, then someone from the corporate headquarters would have to resolve the matter.

Finally, the record does not disclose any probative evidence that the certified opticians are held accountable for the failings of the uncertified opticians or that they have authority to take corrective action for uncertified opticians' errors, thereby undermining any claim that they have the authority to assign or responsibly direct employees.

5. SECONDARY INDICIA:

The record reflects that the method of payment for certified opticians was recently changed from an hourly to salaried basis. The uncertified optician is paid hourly and significantly less than the certified opticians. In addition, the certified opticians participate in weekly calls with Powell while uncertified opticians generally do not. However, both of these factors are secondary indicia of supervisory authority and are not dispositive of supervisory status in the absence of evidence of the possession of statutory indicia. See, *Training School of Vineland*, 332 NLRB 1412 (2000); *Dean & Deluca New York, Inc*., 338 NLRB 1046 (2003). Lastly, although the certified opticians are referred to as store managers or office managers, they have the option of wearing name tags simply stating "certified optician." In any event, titles alone do not confer supervisory status. *Bowne of Houston, Inc*., 280 NLRB 1222, 1225 (1986).

6. MANAGERIAL:

The Board, with approval by the Supreme Court, defines managerial employees as those who "formulate and effectuate management policies by expressing and making operative the decisions of their employer, and those who have the discretion in the performance of their jobs independent of the employer's established policy." *Solartec, Inc*., 352 NLRB 331, 333 (2008), quoting *General Dynamics Corp*., 213 NLRB 851, 857 (1974).

The Employer contends that that the certified opticians are managerial employees because they can pledge the Employer's credit, make oral agreements with doctors, participate in a profitability incentive bonus, and participate in weekly calls with management. With respect to pledging credit, the record reflects that although the certified opticians have a company credit card with a monthly credit line of approximately $350, the Employer has instructed the certified opticians that they are only permitted to spend $40 per month. The record discloses that certified opticians use this limited amount of credit to restock incidental supplies, such as paper and pencils. The Employer noted one instance in which a certified optician exceeded the $40 limit for the purpose of buying a shredder, but it is unclear whether the certified optician had obtained prior approval from someone in management or had simply contravened company policy. The ability of certified opticians to pledge minor amounts of money for routine items to maintain the operational status quo does not warrant a finding of managerial status. *Sampson Steel and*

Supply, Inc., 289 NLRB 481 (1988) CEO Bertrand also testified that the certified opticians could enter into oral "informal partnerships" with businesses and optometrists for the purpose of increasing sales, but he was unable to cite any actual examples of this occurring. Moreover, Bertrand selects the lab which manufactures the eyeglasses for the Employer and he is responsible for selecting the products that are sold by the certified and uncertified opticians.

In approximately June 2009, the Employer changed the manner of pay for certified opticians from hourly to salary, eliminated overtime, and instituted a profitability incentive, without any apparent input from the certified opticians. The record reflects certified opticians can earn bonuses as profits increase; however, there is no evidence in the record that the certified opticians own shares of stock that constitute a majority interest or allow them to exert influence over management policy. See, *Centurion Auto Transport*, *Inc*., 329 NLRB 394, 400 (1999). The certified opticians apparently play no role in formulating the employee handbook nor do they assist in creating any management policy during their weekly telephone conference calls with Powell.

The Employer failed to present any probative evidence showing that the certified opticians participate in decision making involving the formulation of any management policy or that they have discretion to depart from the Employer's established policies. Based on the record as a whole, it is clear that the certified opticians do not hold the type of position "much higher in managerial structure" than those explicitly mentioned by Congress, which 'regarded [them] as so clearly outside the Act that no specific exclusionary provision was thought necessary.'" *Yeshiva*, supra at 682-683, quoting *NLRB v. Aerospace*, 416 U.S. 267, 283 (1974).

For the foregoing reasons and based on the record as a whole, I conclude that the Employer has not met its burden of proving that the certified opticians are supervisors within the meaning of Section 2(11) of the Act or managerial employees. Accordingly, I find that the certified opticians should be included in the bargaining unit sought by the Petitioner.

V. EXCLUSIONS

The parties stipulated and the record shows that Eric Bertrand, Chief Executive Officer and Jason Powell, Vice-President of Operations, are supervisors with the authority defined by Section 2(11) of the Act. Accordingly, I will exclude them from the unit found appropriate.

VI. CONCLUSIONS AND FINDINGS

Based upon the foregoing and the entire record in this matter, I conclude and find as follows:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are affirmed.

2. The Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction in this case. [14]/

[14]/ At hearing, the parties stipulated that during the past 12 months, a representative period, the Employer, a limited liability corporation, purchased and received goods valued in excess of $50,000 which were shipped to its Columbus, Ohio facilities directly from points outside the State of Ohio.

3. The Union is a labor organization within the meaning of Section 2(5) of the Act.

4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(C)(1) and Section 2(6) and (7) of the Act.

5. The following employees of the Employer constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act:

> All full-time and regular part-time certified and uncertified optician technicians employed by the Employer and working at Meijer stores located in Reynoldsburg, Canal/Winchester and Grove City, Ohio, but excluding all office clerical employees, professional employees, managerial employees, and all guards and supervisors as defined by the Act.

VII. DIRECTION OF ELECTION

The National Labor Relations Board will conduct a secret ballot election among the employees in the unit found appropriate. The employees will vote on whether they wish to be represented for purposes of collective bargaining by the United Food and Commercial Workers International Union, Local 1059. The date, time, and place of the election will be specified in the notice of election that the Board's Regional Office will issue subsequent to this Decision.

VIII. VOTING ELIGIBILITY

Eligible to vote in the election are those in the unit who were employed during the payroll period ending immediately before the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Employees engaged in any economic strike, who have retained their status as strikers and who have not been permanently replaced are also eligible to vote. In addition, in an economic strike which commenced less then 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements, are eligible to vote. Unit employees in the military services of the United States may vote if they appear in person at the polls.

Ineligible to vote are: (1) employees who have quit or been discharged for cause since the designated payroll period; (2) striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date; and (3) employees who are engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced.

IX. EMPLOYER TO SUBMIT LIST OF ELIGIBLE VOTERS

To ensure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses, which may be used to communicate with them. *Excelsior Underwear, Inc*., 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Company*, 394 U.S. 759 (1969).

Accordingly, it is hereby directed that within 7 days of the date of this Decision, the Employer must submit to the Regional Office an election eligibility list, containing the full names and addresses of all the eligible voters. *North Macon Health Care Facility*, 315 NLRB 359, 361 (1994). This list must be of sufficiently large type to be clearly legible. To speed both preliminary checking and the voting process, the names on the list should be alphabetized (overall or by department, etc.). This list may initially be used by me to assist in determining an adequate showing of interest. I shall, in turn, make the list available to all parties to the election, only after I shall have determined that an adequate showing of interest among employees in the unit found appropriate has been established.

To be timely filed, the list must be received in the Regional Office, Region 9, National Labor Relations Board, John Weld Peck Federal Building, 550 Main Street, Room 3003, Cincinnati, Ohio on or before **September 16, 2009**. No extension of time to file this list will be granted except in extraordinary circumstances, nor will the filing of a request for review affect the requirement to file this list. Failure to comply with this requirement will be grounds for setting aside the election whenever proper objections are filed. The list may be submitted by facsimile transmission at (513) 684-3946. Because the list will be made available to all parties if it is determined to proceed to an election, please furnish **two** copies, unless the list is submitted by facsimile, in which case no copies need be submitted. If you have any questions, please contact the Regional Office.

X. NOTICE OF POSTING OBLIGATIONS

According to Section 103.20 of the Board's Rules and Regulations, the Employer, if an election is subsequently ordered, must post the Notices to Election provided by the Board in areas conspicuous to potential voters for a minimum of 3 working days prior to the date of the election. Failure to follow the posting requirement may result in additional litigation if proper objections to the election are filed. Section 103.20(c) requires an employer to notify the Board at least 5 full working days prior to 12:01 a.m. of the day of the election if it has not received copies of the election notice. *Club Demonstration Services*, 317 NLRB 349 (1995). Failure to do so estops employers from filing objections based on nonposting of the election notice.

XI. RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, D.C. 20570-0001. This request must be received by the Board in Washington by 5 p.m., EST on **September 23, 2009 unless filed electronically.** Consistent with the Agency's E-Government initiative, parties are **encouraged to file a request for review electronically.** If the request for review is filed electronically, it

will be considered timely if the transmission of the entire document through the Agency's website is **accomplished by no later than 11:59 p.m. Eastern Time** on the due date. Please be advised that Section 102.114 of the Board's Rules and Regulations precludes acceptance of a request for review by facsimile transmission. Upon good cause shown, the Board may grant special permission for a longer period within which to file. [15]/ A copy of the request for review must be served on each of the other parties to the proceeding, as well as on the undersigned, in accordance with the requirements of the Board's Rules and Regulations.

Filing a request for review electronically may be accomplished by using the E-filing system on the Agency's website at www.nlrb.gov. Once the website is accessed, select the E-Gov tab and then click on E-filing link on the pull down menu. Click on the "File Documents" button under Board/Office of the Executive Secretary and then follow the directions. The responsibility for the receipt of the request for review rests exclusively with the sender. A failure to timely file the request for review will not excused on the basis that the transmission could not be accomplished because the Agency's website was off line or unavailable for some other reason, absent a determination of technical failure of the site, with notice of such posted on the website.

Dated at Cincinnati, Ohio this 9th day of September 2009.

/s/ Gary W. Muffley
Gary W. Muffley, Regional Director
Region 9, National Labor Relations Board
3003 John Weld Peck Federal Building
550 Main Street, Room 3003
Cincinnati, Ohio 45202

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[15]/ A request for extension of time, which may also be filed electronically, should be submitted to the Executive Secretary in Washington, and a copy of such request for extension of time should be submitted to the Regional Director and to each of the other parties to this proceeding. A request for an extension of time must include a statement that a copy has been served on the Regional Director and on each of the other parties to this proceeding in the same manner or a faster manner as that utilized in filing the request with the Board.